IN THE MATTER OF: **Law Enforcement Review Act Complaint #3181.**

AND IN THE MATTER OF: **An Application pursuant to section 17 of The Law Enforcement Review Act, C.C.S.M., c. L75.**

BETWEEN:

K. A. A. ,

Complainant,

- and -

CST. S. D. and CST. R. K.

Respondents.

THE HONOURABLE JUDGE RICHARD CHARTIER

HEARING DATES: December 15, 1999, March 2 and 3, 2000, and April 20, 2000.

DECISION GIVEN ON OCTOBER 26, 2000.

I. THE ISSUES

The Law Enforcement Review Commission (hereinafter referred to as the "Commission"), being unable to resolve this complaint under sections 15 or 16 of The Law Enforcement Review Act, C.C.S.M., c. L75 (hereinafter

referred to as the "Act"), referred this matter to a provincial judge for hearing on the merits of the complaint pursuant to subsection 17(1) of the Act.

On January 14, 1998, K. A. A. (hereinafter referred to as the "Complainant") filed a complaint alleging the commission of certain disciplinary defaults, as defined under section 29 of the Act, by Constables S. D. and R. K. (hereinafter referred to individually as the "Respondent" or collectively as the "Respondents"). The complaint alleges that the Respondents did:

1. on or about January 11, 1998 abuse their authority by using unnecessary violence or excessive force on the Complainant contrary to section 29(a)(ii) of the Act; and

2. on or about January 11, 1998 abuse their authority by using oppressive or abusive conduct or language towards the Complainant contrary to section 29(a)(iii) of the Act.

II. THE STANDARD OF PROOF

The standard of proof in such matters is found in subsection 27(2) which states that the provincial judge shall dismiss a complaint in respect of

an alleged disciplinary default unless he or she "is satisfied on clear and convincing evidence" that the respondent has committed the disciplinary default.

This is a high standard of proof because the consequences to the careers of the police officers resulting from an adverse decision are very serious. The evidence must be clear; it must be free from confusion. It must also be convincing which, when combined with the word "clear," in my view means that it must be compelling.

III. ALLEGATIONS OF DISCIPLINARY DEFAULTS

The allegations against the Respondents with respect to:

1. using unnecessary violence or excessive force on the Complainant are as follows:

   - that Respondent K. grabbed the Complainant's hair and pulled it as far as he could (p. 26 of the transcript);
   - that Respondent D, pepper sprayed the Complainant twice in the face (p. 27 of the transcript);

2. using oppressive or abusive conduct or language towards the Complainant are as follows:

- that the Respondents escorted the Complainant to the cruiser car in the middle of January bare-chested (p. 30 of the transcript);
- that the Respondents told the Complainant that if he didn't stop crying, they were going to roll him in the snow (p. 31 of the transcript).

IV. THE FACTS

A little after midnight on Sunday, January 11, 1998, the Respondents attended the residence of the Complainant's parents to arrest the Complainant on charges of assault and uttering threats against his ex-wife. The Complainant, a punch press operator 2, had gone to sleep as he was working early the next morning. When the Respondents attended to the Complainant's parents' home, they were met at the door by the father who allowed them into the kitchen area of the home. The mother of the Complainant then awoke the Complainant to advise him that the Respondents were there to talk to him. The Complainant put on his pants and entered the kitchen area. Attached to the belt of his pants was a knife

sheath. This knife sheath contained a knife which the Complainant uses as a tool in his line of work.

The Complainant testified (at pp. 21-22 of the transcript) that he was told by the Respondents that his ex-wife had made some allegations against him and that they wanted to take him in for questioning. The Complainant advised the Respondents that he had to get up early to go to work the next morning and that he would come in after work later that day. The Complainant testified the officers then indicated to him (p. 23 of the transcript) that he had to come with them and that he had no choice. The Complainant responded by saying, "I'm not going anywhere" (p. 23 of the transcript).

As a result of this exchange of words, the Respondent K. grabbed the Complainant's left arm and a struggle ensued resulting in the kitchen table being overturned and the items on it being shattered all over the floor. The Complainant landed on his chest on top of his right arm. Respondent K. was on top of him holding the Complainant's left arm.

It is clear from the evidence that when the officer grabbed the Complainant to force him to stand up, this caused the kitchen table to flip over as the Complainant had a hold of it. This, in turn, caused the glass items to be broken. It is also clear that a significant commotion occurred in the kitchen as a result of the table flipping over and of glass being broken.

The Complainant's mother took the witness stand. She essentially corroborated the Complainant's version, confirming that she saw the hair pulling, the pepper spraying, her son leaving the house without a jacket, and confirming that she heard the Respondents say to her son to shut up or he would be rolled in the snow. She also testified:

1. that she recalls the police explaining to the Complainant something about the allegations made by his ex-wife (p. 130 of the transcript);
2. that she advised it was the Complainant that caused the table to flip over (p. 138 of the transcript);
3. that she did tell the Complainant to "stop struggling and cooperate with these officers" (p. 139 of the transcript); and
4. that the Complainant did say "he wasn't going to go" and that he did try to pull away, "Well, I guess, you know, he just tried to pull away, I

guess, you know, more or less, you know" (page 143 of the transcript).

Mr. A. A. , father of the Complainant, was also a witness. Mr. A. , father, also corroborated the evidence given by the Complainant. He testified:

1. that he tried to intervene in the altercation by splitting up the Complainant and the Respondent K. (pp. 159 and 165 of the transcript);
2. that the police had told the Complainant upon entering that his ex-wife had accused the Complainant of certain things (p. 168 of the transcript);
3. that he recognized that the kitchen area of the home would have been a dangerous area to be in as a result of all the broken glass (p. 179 of the transcript);
4. that he recalls his wife telling the Complainant to stop struggling and cooperate with the police (p. 188 of the transcript).

I must point out that during cross-examination, the father answered most of the time that he didn't remember or couldn't recall. This was not,

however, the case when he was examined by his son's lawyer. His memory certainly seemed selective.

The Respondents testified that from their perspective, they were encountering the following situation:

1. they knew that there were allegations of violence against the Complainant made by his ex-wife;
2. though they had never had any dealings with the Complainant, the Respondents knew by way of a background check that there was some history of violence;
3. they noticed the knife sheath around the Complainant's belt;
4. during the struggle while one of his arms was free they were aware that there was broken glass lying around that the Complainant could have used as a weapon;
5. they also knew that when he was on the ground he had his right arm free under his chest, thus making the knife on his belt accessible to his right hand;
6. they had, as a result of the domestic violence zero-tolerance policy, grounds to arrest the Complainant;

7. they were intent to bring the Complainant in to the station that night in order to ensure that conditions be in place to prevent him from contacting his ex-wife. This was to ensure that no further violence occurred between the two; and
8. they had been advised by the ex-wife that "she was very fearful for hers and her children's safety" (p. 101 of the transcript).

The Complainant testified that from his perspective:

1. he had been awoken in the middle of the night;
2. he knew that he had to get to work early the next morning;
3. he denied the allegations made by his ex-wife; and
4. he thought that this matter could best be resolved by giving the police officers his word that he would come in the next day after work to deal with these matters.

V. THE INJURIES

As a result of the incident, the Complainant received the following injuries (p. 35 of the transcript):

- his left foot was swollen so badly he couldn't put his boot on;
- his ribs were extremely sore;

- his head was sore from having his hair pulled;
- part of his hand was numb because of the handcuffs;
- he had various cuts and scrapes because of all the broken glass that was on the floor.

He indicates that he missed two weeks of work as a result of this altercation.

It is to be noted in the prisoner injury report filed as Exhibit 8 the Respondents explained the injuries of the Complainant in the following terms: "Injuries of the accused were sustained as a result of the accused resisting arrest and the subsequent struggle with police in effecting the arrest" (box 9 of the report). In box 13 of the report the Complainant gives the following explanation of the injuries: "Rolling around on the ground while they were putting the cuffs on me."

VI. THE LAW

Have the Respondents committed disciplinary defaults and abused their authority by using unnecessary violence or excessive force and/or by using oppressive or abusive conduct or language towards the Complainant? Counsel for the Respondents argued that when reviewing the disciplinary

defaults, the judge hearing the matter must ask himself/herself whether a reasonable person with the training of a police officer would have reacted in a similar fashion. Citing the British Columbia Court of Appeal decision of ***R. vs. Bottrell*** (1981), 60 C.C.C. (2d) 211 and ***R. vs. Graydon*** (1992), 128 A.R. 101 from the Alberta Court of Queen's Bench, he suggests the application of a subjective-objective test. The subjective portion is whether the Respondents had concerns about their safety and concerns about the actions of this individual. The second portion of the test is whether or not the Respondents' concerns were based on reasonable grounds, this being the objective portion of the test.

Counsel for the Complainant rejects this two-pronged approach and suggests that I review the evidence in its entirety and determine whether it was reasonable for the Respondent officers to have acted in the manner that they did.

On this point I must agree with counsel for the Complainant. The complaint shall be dismissed unless I am satisfied on clear and convincing evidence, after reviewing all of the evidence before me, that the Respondent officers acted unreasonably and committed the disciplinary defaults by using

unnecessary violence or excessive force, or by using oppressive or abusive conduct or language.

VII. FINDINGS

First of all there was the issue raised by defence counsel that this whole incident must be placed in the context that the Respondents never arrested the complainant. Whether the Respondents used the word "arrest" on the night in question is immaterial. It was clear, even from the Complainant's evidence, that he was not left with any choice but to accompany the Respondents to the cruiser car. The evidence is clear that the Complainant did not want to do so and that he was resisting. It is also clear from the evidence that the Respondents did explain to the Complainant the allegations made by his ex-wife, and that they wanted the Complainant to accompany the Respondents.

After having reviewed all of the evidence, I do not find that there is clear and convincing evidence that is free from confusion and sufficiently compelling to find that the Respondent officers used unnecessary violence or excessive force, or used oppressive or abusive conduct or language. The following are my more detailed reasons:

a) The hair pulling incident

Was the grabbing of the Complainant's hair by Respondent K. unnecessary violence or excessive force? I must be satisfied on clear and convincing evidence that it was. Clearly, this wasn't a gratuitous act of hair pulling by the Respondent K. He testified that he may have grabbed the Complainant's hair while on the ground because the Complainant wasn't wearing any clothes waist up, resulting in the officer not having any leverage to grab on to (p. 98 of the transcript).

Sergeant L. , an officer safety coordinator with the Winnipeg Police Service, was qualified as an expert to give his opinion on matters of use of force, pepper spraying and handcuffing. Sergeant L. testified that they don't teach hair pulling as a way to control a person. However he did indicate that grabbing a handful of hair, in the absence of trying to injure the person's neck or crank their neck in some fashion, would be a soft empty hand control tactic which is an acceptable use of force by police officers.

I must say that of all the acts done by the Respondents in this incident, it was the hair pulling that I found most troubling. However under the circumstances, as the Complainant was not wearing any shirt and as the

Respondents were trying to subdue the Complainant by the use of pepper spray, the pulling of the hair of the Complainant by the Respondent K in order to cause pepper spray to be directed into the face of the Complainant was not excessive force and was not unnecessary violence.

b) The pepper spraying incident

With respect to the pepper spraying incident, it is clear from the evidence the Respondents were now trying to detain a man who was determined and intent on not going with the police officers; who was carrying a knife; and that they were now struggling with the Complainant with broken glass all over the place as a result of the table flipping over. The use of the pepper spray under such circumstances was not, in my view, unreasonable violence or excessive force on the Complainant.

c) The jacket incident

With respect to the matter of oppressive or abusive conduct or language, it is clear from the evidence that the officers, prior to the Complainant leaving the home, did grab his jacket. Whether or not the jacket was put over the Complainant's shoulders before he exited the home is the point that is contested. The Complainant indicates that one of the

Respondents returned to the home to get his jacket, and this is corroborated by his mother. The father testified (p. 166 of the transcript) that he didn't see or recall the officer returning to the house and exchanging information or a jacket between the Respondent D. and his wife. The Respondents indicated that the jacket was draped over the Complainant's shoulders prior to being escorted outside (pp. 41 and 134 of the transcript).

What is clear from the evidence is that the Respondents did grab the jacket in the home prior to leaving. What is not clear is whether the jacket was draped over the Complainant's shoulders before they left the home. However, even if I were to accept the version of the Complainant and his mother with respect to being led outside without a jacket, it is still clear from the evidence that it was the Respondents who, on their own volition, took the necessary steps to get a jacket for the Complainant.

This last point is certainly not indicative of oppressive or abusive conduct or language towards the Complainant, and is inconsistent with the allegation being made against them. As a result of all of this, I am not satisfied by clear and convincing evidence that the Respondents committed a disciplinary default with respect to the incident with the jacket.

d) The "roll in the snow" incident

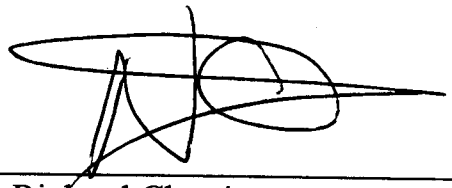
With respect to the allegation of using oppressive or abusive language in saying to the Complainant to "stop crying or we'll roll you in the snow," I am left somewhat perplexed that this element is nowhere to be found in the statement of the mother of the Complainant. When questioned about the fact that this was left out of her statement, Mrs. Anderson testified that she did not tell them "... because they said, well, it wasn't necessary, you know, to have it in here" (p. 116 of the transcript).

I find that explanation hard to believe as that allegation was clearly stated in the Complainant's statement given an hour or so earlier by the Complainant. The Commission knew that that allegation had already been made in written form. I find it unbelievable that the Commission would then tell the mother that "it wasn't necessary."

If the Respondents said this, it would be inappropriate and a disciplinary default. However the evidence is not free from confusion, and as such I am not satisfied that this disciplinary default has been proved to the degree that it must.

As a result of all of the above, this complaint is dismissed and I order, pursuant to section 25(b), a ban on the publication of both Respondents' names.

Signed at the City of Winnipeg this 26th day of October, 2000.



Judge Richard Chartier